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No. 89-1321

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

PAUL BORN III,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

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May it please the Court:

The Brief for the United States contains two very serious misstatements. One is a misrepresentation of the record; the other is a flagrantly erroneous interpretation of relevant lower court opinions.

Each of those misleading statements is a grave departure from objectivity. Taken in tandem, they have the potential for frustration of the judicial process in this case. That possibility is enlarged by the presumptive reliability normally attributed to the statements of government counsel.

A Reply Brief is not an appropriate vehicle for argument of all issues. We limit this Brief to consideration of the Government's misguiding statements, and treat each of them in turn.

I. The Misstatement of Law: The Supposed Need for a Stipulation

The opinion below and the law of the Second Circuit are in clear conflict. The opinion below reflects the Seventh Circuit view that intent is in issue in every case of this type, justifying "other acts" evidence in all such cases. The Second Circuit, on the other hand, holds that intent is not placed in issue by a denial that the defendant performed the act charged to him. The relevant cases were cited at page 11 of our Petition.

The Government argues that the inter-Circuit conflict is not involved in this case because Petitioner did not tender a stipulation that the issue of intent would not be disputed (Govt. Br. at 7.)

It is true that such a stipulation was tendered in United States v. Colon, 880 F. 2d 650, 658-60 (2 Cir 1989), the

case which contains the definitive expression of the Second Circuit position. Such a stipulation, however, is useful only for the purpose of forestalling the introduction of "other acts" evidence as a part of the prosecution's case in chief. It has no relevance whatever to the admissibility of such evidence during rebuttal.

If, in advance of trial, the prosecution indicates an intention to introduce "other acts" evidence, the defendant may tender a stipulation to remove intent from the case. That stipulation, however, would affect only the prosecution case in chief. An order excluding "other acts" evidence, based on that stipulation, would not prohibit the prosecution from rebutting any express denials which a defendant might volunteer while presenting his own case.

Such a stipulation, however, serves no purpose where, as here the prosecution states in advance of trial that it will not use "other acts" evidence during its case in chief. By making that statement, the government offered everything that a stipulation could accomplish: The only purpose of such a stipulation is to prevent the introduction of such evidence during the prosecution case in chief.

Once the defense case has been presented, the admissibility of such evidence on rebuttal is determined by the content of the defense evidence, and the pretrial stipulation becomes irrelevant.

That proposition is obvious, both as a matter of logic and as a rule of law. Colon states that intent can be removed from a case "either by putting forward a particular theory of defense or by specifically offering to stipulate." 880

F. 2d at 657, emphasis added. If the defendant commits himself firmly to a theory, or (with even more conclusive effect) completes the presentation of his evidence, every possible purpose of a stipulation has been satisfied completely.

In the Second Circuit, as everywhere else, a defense stipulation simply serves no purpose when the government states that "other acts" evidence will not be used during its case in chief. After the government's case has been heard, it is the defense evidence and not a pretrial stipulation which determines the admissibility of "other acts" or any other form of rebuttal evidence.

That obvious proposition is confirmed by the Colon opinion, upon which both Petitioner and the Government rely. It is difficult to imagine how the Government could have interpreted Colon otherwise.

As previously quoted at page 4 of this Reply, Colon unequivocally holds that a clear statement of the defense theory is the equivalent of a tender of stipulation.

Colon is based largely upon United States v. Ortiz, 857 F. 2d 900 (2 Cir 1988), which did not involve a pretrial stipulation. The Ortiz court stated:

> "Moreover, intent is not placed in issue by a defense that the defendant did not do the charged act at all. [Citations] When a defendant unequivocally relies on such a defense, evidence of other acts is not admissible for the purpose of proving intent." 857 F. 2d at 904.

A stipulation serves no purpose other than as an advance indication of a defendant's theory. Once the defendant has offered his evidence, it is neither necessary nor rational to rely on any other indication of his theory.

In the case before Your Honors, the "other acts" evidence was introduced after

the Petitioner had presented his evidence, and had made it clear that the defense was simply a denial that he had performed the acts charged against him. To contend, as the Government does, that Petitioner should be denied relief because he did not offer to stipulate that his evidence had been that which the trial court had heard, barely rises to the dignity of absurdity.

II. The Misstatement of Fact: Denial of Knowledge of Cocaine

The Government also seeks to avoid the inter-Circuit conflict by stating that the difference between the Second Circuit and Seventh Circuit rules is irrelevant. The argument is made that, regardless of the intent issue, the "other acts" evidence was admissible for the purpose of impeaching Petitioner's supposed testimony that he knew nothing about cocaine (Govt Br. at 8.)

But there was no such testimony. The page references offered by the Government do not support its assertions. Petitioner stated only than that at the time of his arrest he had told the arresting officers that he knew nothing about the cocaine which had been found at the scene of the arrest (Tr. 1453.)

Far from denying all knowledge of cocaine, he admitted knowing that the term "OZ" was used by involved persons to refer to an ounce of cocaine (Tr. 1529).

The "other acts" testimony was not offered nor received as rebuttal of any such statement as that wrongly attributed to him by the Government Brief. It was received, and its reception was justified below, only because Petitioner had "denied any involvement in the charged drug conspiracy" (App. 9, 10). That theory of admissibility was grounded on the Seventh

Circuit view that "in cases involving specific intent crimes, intent is automatically in issue," (App. 10.)

If, as the Government now suggests, Born had denied all knowledge of cocaine, the Mueller testimony would have been offered, received and upheld at trial and on appeal without necessity for resort to the complex rationale expressed by the Court of Appeals (App. 8-10).

The conflict between the Second and Seventh Circuits is presented squarely by this case. That conflict addresses the essence of the Sixth Amendment guarantee of trial on a specific accusation. It cries for this Court's authoritative resolution.

Respectfully submitted,

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